(2) (2)

Nos. 04-1704 and 04-1724

Supreme Court, U.S.
FILED
AUG 17 2005
OFFICE OF THE CLERK

In The Supreme Court of the United States

DAIMLERCHRYSLER CORP., et al.,

Petitioners,

v.

CHARLOTTE CUNO, et al.,

Respondents.

AND

WILLIAM W. WILKINS, Tax Commissioner etc., et al.,

Petitioners,

v.

CHARLOTTE CUNO, et al.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN RESPONSE TO PETITIONS FOR *CERTIORARI*

TERRY J. LODGE, ESQ.
Counsel of Record
316 N. Michigan St., Suite 520
Toledo, OH 43624-1627
(419) 255-7552

ALAN MORRISON, ESQ.
PETER D. ENRICH, ESQ.

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Was the Sixth Circuit correct in finding that a state investment tax credit, which provides tax benefits only to those taxpayers who locate new capital investments in the state, violates the Commerce Clause's prohibition on discriminatory tax provisions because the law provides preferential tax treatment that favors in-state economic activity?

TABLE OF CONTENTS

	Page
Question Presented	i
Table Of Contents	ii
Table Of Authorities	iii
Introduction	1
Statement Of The Case	2
Discussion	5
A. The decision below involves a recurring issue of great practical importance.	5
B. The Sixth Circuit's finding that Ohio's ITC is unconstitutional follows directly from this Court's well-established Commerce Clause jurisprudence and should be affirmed	8
Conclusion	18

TABLE OF AUTHORITIES

Page

CASES:

American Trucking Ass'n, Inc. v. Scheiner, 483 U.S. 266 (1987) 14

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) ... 12, 15

Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318 (1977) ..... *passim*

Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564 (1997) 8, 14

Caterpillar, Inc. v. Department of Treasury, 488 N.W.2d 182 (Mich. 1992) 16, 17

Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159 (1983) 3

Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64 (1963) 10

Hughes v. Oklahoma, 441 U.S. 322 (1979) 8

Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977) 2

Maryland v. Louisiana, 451 U.S. 725 (1981) 9, 10, 14

McLeod v. J.E. Dilworth Co., 322 U.S. 327 (1944) 8

Oregon Waste Systems, Inc. v. Dep't of Envtl. Quality, 511 U.S. 93 (1994) 9

Trinova Corp. v. Michigan Dept. of Treasury, 498 U.S. 358 (1991) 16

West Lynn Creamery v. Healy, 512 U.S. 186 (1994) ... 15, 16

Westinghouse Electric Corp. v. Tully, 466 U.S. 388 (1984) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

Ohio Rev. Code § 5733.05(B)(2) 4

OTHER AUTHORITIES:

California Legislative Analyst's Office, *An Overview of California's Manufacturers' Investment Credit* 11 (Oct. 2002) 7

Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Restraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 434-37 (1996) 3

Robert J. Firestone, *State Investment Tax Credits Do Not Violate the Dormant Commerce Clause*, 36 STATE TAX NOTES 189 (2005) 11

Peter Fisher, *Tax Incentives and the Disappearing State Corporate Income Tax*, 2002 STATE TAX TODAY 42-1 (March 4, 2002) 6

Walter Hellerstein & Daniel T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 817-18 (1996) 3, 12, 13

Joseph Kahn, *Treasury Choice Varies from Bush on Tax Outlook*, N.Y. TIMES, Jan. 18 2001 at A-1, A-16 7

Robert G. Lynch, RETHINKING GROWTH STRATEGIES (2004) 25-36 7

Robert D. Plattner, *State Business Tax Incentives: Are They Vulnerable to Constitutional Attack*, 2000 STATE TAX TODAY 128-19 (July 3, 2000) 3

TABLE OF AUTHORITIES – Continued

Page

State Tax Advisory Board Focuses on High Court Developments, Nexus, and More During October 1995 Roundtable, 56 ST. TAX. REP. (CCH) No. 49, at 8, 9-10 (Dec. 4, 1995) 3

Taft Applauds Federal Grant for Lima, available at http://governor.ohio.gov/releases/072205Lima.htm (July 22, 2005) (discussing federal and state incentives used to secure ethanol production facility) 8

Taft Visits LORD Corporation to Celebrate Dayton Facility Expansion, available at http://governor.ohio.gov/releases/072005LORD Corp.htm (July 20, 2005) 8

Philip Tatarowicz & Rebecca Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 VAND. L. REV. 879 (1986) 11

TEXAS TAX EXPENDITURE AND INCIDENCE REPORT 2005-2007, Table 1 at 36 (2003) 6

Robert Tomsho, *In Toledo, A Tension Between School Funds and Business Breaks*, WALL ST. J., July 18, 2001 at A1 6

INTRODUCTION

These petitions address one portion of a case in which the Sixth Circuit reviewed the constitutionality of two different tax incentives authorized by the State of Ohio and used to encourage DaimlerChrysler Corporation to locate a new manufacturing facility in Ohio. The Sixth Circuit found that Ohio's investment tax credit ("ITC") violated the Commerce Clause, while concluding that its conditional exemption from personal property taxes did not.

Like the State of Ohio, Respondents believe it would be advisable for the Court to review both aspects of this important case, and therefore, we do not oppose the instant Petitions. The two tax incentives challenged in this litigation are both designed to offer preferential treatment to corporate taxpayers who choose to locate substantial new investments in the state of Ohio. Both discriminate, although in somewhat different ways, in favor of businesses that commit to expanded economic activity in Ohio and against those who do not make such commitments. Thus, the two aspects of the case raise closely related questions about the scope of the Commerce Clause's prohibition on discriminatory state tax provisions, and review of the two aspects together would allow the Court to shed useful light on the proper application of the Commerce Clause in both contexts.

Respondents agree, in particular, with Petitioners' assertions concerning the great practical importance of the outcome of this case. Tax incentives similar to Ohio's ITC and its conditional property tax exemptions are deployed by virtually every state, and the impacts on state and local revenues and on the distribution of the costs of government among different classes of taxpayers are dramatic.

Moreover, the proliferation of state and local tax incentives designed to shape business location decisions has gone a long way to fragment the "national 'common market,'" *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977), which the Commerce Clause seeks to preserve.

With regard to the merits of the case, Respondents disagree, not only with Petitioners' view that the Sixth Circuit's decision concerning Ohio's ITC was mistaken, but also with Petitioners' claims about the novelty and complexity of the issues presented. Indeed, as we discuss below, the Sixth Circuit's analysis of Ohio's ITC follows straightforwardly from a long line of this Court's decisions striking down discriminatory tax provisions that provide "a direct commercial advantage to local business." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977). Nonetheless, particularly in light of the need to review the Sixth Circuit's problematic application of Commerce Clause principles to Ohio's conditional property tax exemption, *see* Petition for Writ of Certiorari in No. 04-1407 ("Cuno Petition") at 9-16, Respondents agree that clarification by this Court of the full set of issues presented by this case would advance important Commerce Clause goals.

STATEMENT OF THE CASE

Respondents generally concur with Petitioners' Statements of the Case. Only a few points warrant brief clarification.

First, the Petitioners in 04-1724 ("State Pet.") aver, without any citation, that investment tax credits "have

previously been understood as . . . acceptable." State Pet. at 3. While it is certainly true that such credits have been widely adopted among the States, it is likewise the case that the Sixth Circuit's ruling, finding such credits in violation of the Commerce Clause, had long been anticipated by many students of state and local tax policy. *See, e.g.*, Walter Hellerstein & Daniel T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 817-18 (1996); Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Restraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 434-37 (1996); Robert D. Plattner, *State Business Tax Incentives: Are They Vulnerable to Constitutional Attack*, 2000 STATE TAX TODAY 128-19 (July 3, 2000); *cf. State Tax Advisory Board Focuses on High Court Developments, Nexus, and More During October 1995 Roundtable*, 56 ST. TAX. REP. (CCH) No. 49, at 8, 9-10 (Dec. 4, 1995) (reporting the recognition by a panel of leading state tax practitioners of the Commerce Clause difficulties facing business tax incentives). The Sixth Circuit's decision, while significant in its impact, was far from surprising or revolutionary.

Second, the State Petitioners, in explaining the methodology employed in calculating the portion of a multistate business's income that is subject to Ohio tax, describe Ohio's three-factor formula as reflecting the common approach characterized by this Court as "something of a benchmark." State Pet. at 8 (quoting *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 170 (1983)). But Petitioners fail to mention an important respect in which Ohio's approach departs from the "benchmark" methodology, which equally weights the three factors (property, payroll, and sales). Ohio's approach, by contrast,

assigns the sales factor three times the weight of each of the other factors. *See* Ohio Rev. Code § 5733.05(B)(2). The consequence of this triple weighting of the sales factor is that the attribution of a taxpayer's income to Ohio is determined predominantly on the basis of where its sales are located, a factor unlikely to be significantly affected by a plant location decision. Thus, contrary to Petitioners' speculations, there is likely to be at most a quite modest increase in a taxpayer's Ohio tax liability due to location of a new plant in the state, an increase far smaller than the tax reduction due to Ohio's ITC. And the scale of any tax increase because of the new investment will be still smaller in a case like the present one where the new plant is a replacement for an existing facility in Ohio.

Finally, it is noteworthy that both Petitioners, in their descriptions of the Sixth Circuit's decision, omit any reference to the centerpiece of the court's explanation of how Ohio's ITC violates the Commerce Clause by discriminating between in-state and out-of-state economic activity. Instead, both Petitions focus on a more general phrase (concerning measures whose "economic effect . . . is to encourage further investment in-state at the expense of development in other states") used at one point in the court's discussion, in an effort to suggest that the Sixth Circuit's approach is overbroad. *See* Petition of Daimler-Chrysler Corp., No. 04-1704, at 6; State Pet. at 13. Overlooked is the court's careful description of the specifically discriminatory features that render Ohio's ITC unconstitutional, DaimlerChrysler Pet. App. at 6a:

> Specifically, any corporation currently doing business in Ohio, and therefore paying the state's

> corporate franchise tax in Ohio, can reduce its existing tax liability by locating significant new machinery and equipment within the state, but it will receive no such reduction in tax liability if it locates a comparable plant and equipment elsewhere. Moreover, as between two businesses, otherwise similarly situated and each subject to Ohio taxation, the business that chooses to expand its local presence will enjoy a reduced tax burden, based directly on its new in-state investment, while a competitor that invests out-of-state will face a comparatively higher tax burden because it will be ineligible for any credit against its Ohio tax.

The question addressed by the Sixth Circuit, and the important question to be reviewed by this Court, is whether tax provisions with such an explicitly discriminatory design and effect can withstand Commerce Clause scrutiny.

DISCUSSION

A. The decision below involves a recurring issue of great practical importance.

Respondents concur that the issues raised by this case are of broad national importance, because they will apply to a range of comparable business tax incentives offered by many states. Indeed, it has never been Respondents' intention to single out Ohio's incentive programs as distinctively problematic, nor to place Ohio (or the Sixth Circuit states) at a competitive disadvantage vis a vis the rest of the nation. Instead, Respondents anticipate that a clear statement of the unconstitutionality of discriminatory state tax incentives will free all the states from the

necessity of engaging in an escalating competition over incentives that deprives all of them of needed revenues, while gaining a meaningful competitive advantage for none.

At present, as Petitioners document, investment tax credits, closely comparable to the Ohio program struck down by the Sixth Circuit, are deployed by a substantial majority of the states, and virtually every state with a tax on corporate income offers some variety of credit based on the in-state location of specific forms of economic activity. *See* State Pet. at 22 n.5 (thirty-seven states have ITCs); DaimlerChrysler Pet. at 8-9. Likewise, property tax exemptions that are conditioned on in-state economic activity beyond the investment in the exempted property itself, like the Ohio provision challenged in the Cuno Petition, are an increasingly common feature of state tax systems. *See* Cuno Pet. at 16-17.

Nationally, the impact of these tax breaks on state and local revenues are dramatic. As the State Petitioners observe, the annual cost of ITCs in a handful of states for which estimates were available comes to $844 million, *see* State Pet. at 25, while it is estimated that the annual costs of just one state's property tax exemption program will exceed $400 million by 2008, *see* TEXAS TAX EXPENDITURE AND INCIDENCE REPORT 2005-2007, Table 1 at 36 (2003). The inevitable result is a significant shift of the costs of state and local government to other classes of taxpayers, like Respondents here, and a substantial reduction in states' and localities' ability to deliver important public services. *See, e.g.*, Peter Fisher, *Tax Incentives and the Disappearing State Corporate Income Tax*, 2002 STATE TAX TODAY 42-1 (March 4, 2002); Robert Tomsho, *In Toledo, A*

Tension Between School Funds and Business Breaks, WALL ST. J., July 18, 2001 at A1.

While Respondents generally agree with Petitioners about the great practical importance of the Sixth Circuit's ruling, Petitioners' concerns about the impact of the Sixth Circuit's decision on the ability of states to compete effectively for business investment and jobs are groundless. Indeed, econometric studies have repeatedly demonstrated that the actual influence of state and local tax incentives on business location decisions are, at most, marginal, both because of the small size of state and local taxes relative to other business costs and because competing jurisdictions all offer competing incentives. *See, e.g.*, Robert G. Lynch, RETHINKING GROWTH STRATEGIES (2004) 25-36; California Legislative Analyst's Office, *An Overview of California's Manufacturers' Investment Credit* 11 (Oct. 2002). As former Treasury Secretary and former Alcoa chief executive Paul O'Neill explains, "As a businessman I never made an investment decision based on the tax code. . . . If you give money away I will take it, but good business people don't do things because of inducements." Joseph Kahn, *Treasury Choice Varies from Bush on Tax Outlook*, N.Y. TIMES, Jan. 18, 2001 at A-1, A-16.

Nor is there reason to fear, as Petitioners argue, that the Sixth Circuit's decision places the state of Ohio, or the other states in the Circuit, at a significant competitive disadvantage relative to other states. *See* State Pet. at 22-24; DaimlerChrysler Pet. at 10-11. Not only is there no evidence that investment tax credits like Ohio's are significant factors in business location decisions, but in any case, as Petitioners acknowledge, the decision below has cast a "cloud of uncertainty," *id.* at 9, over the comparable incentives offered by other states, and the incentives

offered by other states could only be influential "if businesses, *improbably*, disregard that uncertainty and rely on those incentives." *Id.* at 10 (emphasis added). Unsurprisingly, and notwithstanding the concerns raised in the State's Petition, Ohio's Governor continues to issue a steady stream of press releases touting new businesses and jobs that the state has been able to attract. *See, e.g.*, *Taft Applauds Federal Grant for Lima*, available at http://governor.ohio.gov/releases/072205Lima.htm (July 22, 2005) (discussing federal and state incentives used to secure ethanol production facility); *Taft Visits LORD Corporation to Celebrate Dayton Facility Expansion*, available at http://governor.ohio.gov/releases/072005LORD Corp.htm (July 20, 2005).

B. The Sixth Circuit's finding that Ohio's ITC is unconstitutional follows directly from this Court's well-established Commerce Clause jurisprudence and should be affirmed.

The central concern of the Commerce Clause is "to avoid the tendencies toward economic Balkanization that had plagued the relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979).[1] Accordingly, this Court has long enforced an "anti-discrimination

[1] *See also Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 571 (1997) ("to keep the commercial intercourse among the States free from all invidious and partial restraints") (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 231 (1824) (Johnson, J., concurring in judgment)); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 (1977) ("the very purpose of the Commerce Clause was to create an area of free trade among the several states") (quoting *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944)).

principle," *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981), barring "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). The Sixth Circuit's decision striking down Ohio's ITC is a straightforward application of this important and well-established principle.

As the Sixth Circuit explained, if an Ohio taxpayer locates a substantial new investment in plant and equipment within the state, it will benefit from a reduction in its Ohio franchise tax, whereas, if it locates the same investment elsewhere, it will continue to bear the full burden of Ohio taxation. *See* DaimlerChrysler Pet. App. at 6a. Thus, "as between two businesses, otherwise similarly situated and each subject to Ohio taxation, the business that chooses to expand its local presence will enjoy a reduced tax burden . . . while a competitor that invests out-of-state will face a comparatively higher tax burden. . . . " *Id.* This is, of course, precisely the end that the ITC is intended to achieve, favoring those businesses that choose to locate their facilities within the state and thereby also favoring the other in-state economic interests (employees, suppliers, etc.) who benefit from in-state facilities. And the ITC unquestionably achieves this end by discriminating in its treatment of otherwise identically situated business taxpayers, based solely on the in-state or out-of-state location of their investments.

Petitioners face a daunting task in attacking the Sixth Circuit's analysis. They are unable to point to a single case among this Court's numerous decisions applying the Commerce Clause's anti-discrimination principle in which the Court has upheld a measure that provided preferential

tax treatment conditioned upon in-state economic activity. In the absence of supportive case law, they instead seek to offer a restrictive reading of the Court's prior cases and discussions which will allow them to distinguish Ohio's ITC from the numerous provisions offering preferences for in-state activity which the Court has previously invalidated. The distinctions that they attempt to draw, however, can neither account for the full range of the Court's prior decisions, nor make sense of the Court's repeated explanations of its consistent prohibition against measures that "provid[e] a direct commercial advantage" to in-state business activity. *E.g., Maryland v. Louisiana*, 451 U.S. at 754; *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977).

For example, Petitioners suggest that the Commerce Clause serves only to prohibit protectionist measures that shelter existing in-state interests from competition from interstate businesses, and not to reach measures which encourage out-of-state actors to direct their economic activity into the state. *See* DaimlerChrysler Pet. at 22-23; State Pet. at 20-21. But, while many of this Court's anti-discrimination cases have addressed such protectionist measures, the Court has never suggested the limitation asserted by Petitioners. On the contrary, the Court has repeatedly condemned measures as discriminatory precisely because they provided incentives for out-of-state businesses to locate their activities within the state. *See, e.g., Maryland v. Louisiana*, 451 U.S. at 756-57 (striking down credit because its "obvious economic effect . . . is to encourage natural gas owners . . . to invest in mineral exploration and development within Louisiana rather than invest in other States"); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72 (1963) (invalidating a measure

because it "encourages an out-of-state operator to become a resident in order to compete on equal terms"). As the Court has emphasized, "A State may no more use discriminatory taxes to assure that nonresidents direct their commerce . . . within the State than to assure that residents trade only in intrastate commerce." *Boston Stock Exchange*, 429 U.S. at 334-35.

In a similar vein, Petitioners contend that the Court's cases striking down state tax measures as discriminatory are confined to two clusters of situations – tariff-like measures that tax out-of-state goods or services, but not their in-state equivalents, and measures that penalize out-of-state activity by increasing taxes on the basis of such activity. *See* State Pet. at 19-20; DaimlerChrysler Pet. at 19, 22-24. Petitioners' suggestion is that a measure, like Ohio's ITC, which favors in-state activity by providing a selective benefit based on such activity, and not by imposing special burdens on out-of-state activity, does not run afoul of the Commerce Clause's anti-discrimination principle.

This bifurcated categorization of the case law had its origins in a 1986 law review article, written to contain the implications of the Court's rapidly expanding body of anti-discrimination tax cases, and particularly of the 1984 decision in *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984). *See* Philip Tatarowicz & Rebecca Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 VAND. L. REV. 879 (1986); *cf.* Robert J. Firestone, *State Investment Tax Credits Do Not Violate the Dormant Commerce Clause*, 36 STATE TAX NOTES 189 (2005) (applying the Tatarowicz/Mims-Velarde framework). But the Sixth Circuit was right, *see* DaimlerChrysler Pet. App. at 9a-10a, to reject

this attempted compartmentalization of the Court's anti-discrimination jurisprudence, because it can account neither for the Court's explanations of its reasoning nor for a number of its decisions. *See also* Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 813-15 (1996) (concluding that the Tatarowicz/Mims-Velarde framework fails to provide a satisfactory account of either the Court's reasoning or its decisions).

Petitioners' proposed framework depends on a crucial distinction between provisions that increase taxpayers' burdens due to out-of-state activity and those that merely diminish burdens on account of in-state activity. But Defendants are unable to cite a single case in which the Court has deployed such a distinction. On the contrary, the Court has expressly, and quite sensibly, disavowed any meaningful distinction, for anti-discrimination purposes, between tax benefits and burdens:

> Virtually every discriminatory statute allocates benefits or burdens unequally; each can be viewed as conferring a benefit on one party and a detriment on the other, in either an absolute or relative sense. The determination of constitutionality does not depend upon whether one focuses upon the benefited or the burdened party.

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 273 (1984).[2]

---

[2] *See also Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 404 (1984) ("Nor is it relevant that New York discriminates . . . by disallowing a tax credit rather than by imposing a higher tax. The discriminatory economic effect of these two measures would be identical.")

Both Petitioners and Tatarowicz and Mims-Velarde themselves seek to deploy their analytic schema to limit the impact of the Court's holding in *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984), which found unconstitutional New York's corporate income tax credits that were measured by the extent of the taxpayer's export activities conducted in New York. As they emphasize, the *Westinghouse* Court observed that the scheme invalidated there, not only increased the credits as activity in New York increased, but also decreased the credits as activity elsewhere expanded, a feature that the Court described as the credit's "most pernicious feature." *Id.* at 401 n.9. But a thorough reading of the Court's opinion makes clear that this feature of the New York provision was not, as Petitioners insist, essential to the Court's ruling. In fact, the Court focused primarily on the benefits provided for New York activity, describing the provision as "an attempt to 'provide a positive incentive for increased business activity in New York.'" *Westinghouse*, 466 U.S. at 393. And when the Court offered three detailed examples of the workings of the credit, each intended to show the discriminatory effects of the provision, only the last of the three exemplified the "penalty" effect, while the other two focused instead on the benefits that result from increasing in-state activity. *Id.* at 401 n.9. As prominent scholars have observed, "The clear thrust of the opinion was that any provision that reduces the taxpayer's 'effective [in-state] tax rate' as the taxpayer engages in more in-state activity violates the Commerce Clause." Hellerstein & Coenen, *supra*, 81 CORNELL L. REV. at 815 (citations omitted). Even *Westinghouse* does not fit the Tatarowicz/Mims-Velarde framework.

Nor can their categorization accommodate a number of the Court's other anti-discrimination decisions. For example, in *Maryland v. Louisiana*, 451 U.S. 725 (1981), the Court struck down several aspects of Louisiana's tax on the transportation in Louisiana of off-shore natural gas, including a credit provision allowing taxpayers to use the tax on off-shore gas to reduce severance taxes on (unrelated) in-state mineral extraction. As the Court explained, the discriminatory feature of this provision was not any penalty imposed on out-of-state operations, but rather the benefit it provided for in-state activity and the resultant incentive "to invest in mineral exploration and development within Louisiana rather than invest in other States." *Id.* at 756-57. Other examples that cannot be accommodated within the Tatarowicz/Mims-Velarde framework include *American Trucking Ass'n, Inc. v. Scheiner*, 483 U.S. 266 (1987) (striking down Pennsylvania's flat-rate axle tax because it has the effect of favoring businesses using their trucks exclusively in-state) and *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564 (1997) (invalidating a Maine property tax exemption restricted to charitable organizations providing the bulk of their services to in-state residents). The simple fact is that the Court's consistent approach has been to invalidate measures that are structured to favor in-state over out-of-state activity, without regard to whether the discrimination is achieved by providing a benefit for in-state activity or a burden on out-of-state alternatives.

Petitioners seek to reinforce their artificial narrowing of the Court's anti-discrimination case law by suggesting that, outside the narrow confines of their framework, the Court ordinarily endorses and approves state efforts to influence business location through tax policies. *See*

DaimlerChrysler Pet. at 16-18; State Pet. at 16. In fact, however, there is no body of Supreme Court case law upholding state tax measures on such grounds. On the contrary, in case after case, the Court has struck down tax provisions precisely because they attempt to steer business activities to a particular state. *See, e.g.*, *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 336 (1977) (holding that efforts to divert interstate commerce are "wholly inconsistent with the free trade purpose of the Commerce Clause"); *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 401 (1984) (noting that in "both *Maryland v. Louisiana* and *Boston Stock Exchange*, the Court struck down state tax statutes that encouraged the development of local industry"); *West Lynn Creamery v. Healy*, 512 U.S. 186, 193 (1994) (explaining the Commerce Clause as directed toward the avoidance of "distorting effects on the geography of production").

In the absence of supportive case law, Petitioners focus on scattered dicta that acknowledge the legitimacy of states acting to "encourage the growth and development of intrastate commerce and industry." DaimlerChrysler Pet. at 17 (quoting *Boston Stock Exchange*, 429 U.S. at 336-37). But these dicta offer nothing to support tax provisions that single out in-state economic activity for preferential treatment. On the contrary, they have consistently been careful to distinguish the legitimacy of the state's purposes from the acceptability of the means selected to further them, *see, e.g.*, *Bacchus Imports*, 468 U.S. at 271, and to clarify that the permissible means do not include measures that discriminate in their treatment of in-state and out-of-state activity, *see, e.g.*, *Boston Stock Exchange*, 429 U.S. at 329. The specific sorts of state competition for industry that the Court's dicta have countenanced, such as uniformly

applicable reductions of state taxes and government support for services needed by business, *see, e.g., West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199 n.15 (1994), include only provisions that do not differentiate benefits or burdens based on a business's location.[3]

Finally, unable to find any support in the decisions of this Court, Petitioners contend that the Sixth Circuit's decision is in conflict with the ruling of the Michigan state courts in *Caterpillar, Inc. v. Department of Treasury*, 488 N.W.2d 182 (Mich. 1992). *See* State Pet. at 14-15; DaimlerChrysler Pet. at 11-12. But, as State Petitioners acknowledge, at 15, that case concerned a tax regime, and a tax benefit, dramatically different from those in the present case.

The tax involved in *Caterpillar* was Michigan's unique Single Business Tax, a form of value-added tax under which a business's tax liability is measured, not by its net income, but by its total business activity, including, *inter alia*, its costs for payroll and for acquisition of capital equipment, apportioned to reflect the portions of that activity attributable to Michigan. *See generally Trinova Corp. v. Michigan Dept. of Treasury*, 498 U.S. 358 (1991)

---

[3] The State Petitioners go so far as to suggest that the *Westinghouse* Court specifically endorsed the use of tax incentives, including investment tax credits. *See* State Pet. at 16. But a full reading of the relevant passage, *Westinghouse*, 466 U.S. at 407 n.12, reveals that the Court was taking no position on this question, but was merely describing the position articulated by New York: "The Tax Commission seeks to classify the tax credit at issue here as an indirect subsidy to export commerce, similar to provision and maintenance of ports, airports, waterways, and highways; to provision of police and fire protection; and to enactment of job-incentive credits and investment-tax credits." The Court offers no opinion on which, if any, of such measures would pass constitutional muster.

(discussing Michigan's Single Business Tax). The challenged provision in *Caterpillar* was a "capital acquisition deduction" ("CAD") which adjusted the tax base to exclude the costs for capital acquisitions tied to Michigan business activity. Since the single business tax base was designed to include only the share of capital acquisitions attributable to its in-state activity, the Michigan court concluded that a deduction designed to be similarly restricted to capital acquisitions attributable to Michigan does not discriminate. "Since the tax base after apportionment represents only Michigan business activity, only capital acquisitions related to Michigan business activity should qualify for treatment pursuant to the CAD. The CAD . . . is designed to accomplish this result." *Caterpillar*, 488 N.W.2d at 186. In short, in the Michigan court's view, the CAD did not discriminate because both the tax base and the deduction were designed to include only those capital acquisitions attributable to Michigan, so that the CAD did not confer any competitive advantage on in-state capital investment. *See id.* at 192. Thus, in upholding the CAD, the Michigan court characterized both its purpose and its effects in ways entirely inapplicable to Ohio's ITC.

In sum, the Sixth Circuit's decision invalidating Ohio's ITC represents a straightforward application of a well established and central element of this Court's Commerce Clause jurisprudence. Despite Petitioners' claims, it raises no conflicts with the prior decisions of this Court, or of the lower courts, and, in fact, any contrary ruling would have required heroic efforts to distinguish and avoid this Court's numerous anti-discrimination precedents. Petitioners seek to cloud this fact by emphasizing the Court's observation in *Westinghouse* that its Commerce Clause analysis "has left much room for controversy and confusion

and little in the way of precise guides to the States in the exercise of their indispensable power of taxation." DaimlerChrysler Pet. at 13; State Pet. at 14 (quoting *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 403 (1984)). But, for the reasons explicated by the Sixth Circuit and in this Memorandum, just as the Court went on to observe in *Westinghouse*, "there is little room for such 'controversy and confusion' in the present litigation." *Id.*

CONCLUSION

This case presents issues of great practical importance which would benefit from the Court's review. On the merits, the portion of the Sixth Circuit's decision invalidating Ohio's ITC follows straightforwardly from this Court's well-established Commerce Clause jurisprudence and should be affirmed.

Respectfully submitted,

ALAN MORRISON, ESQ.
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-9648

PETER D. ENRICH, ESQ.
NORTHEASTERN UNIVERSITY
SCHOOL OF LAW
400 Huntington Avenue
Boston, MA 02115
(617) 373-5094

TERRY J. LODGE, ESQ.
Counsel of Record
316 N. Michigan St.,
Suite 520
Toledo, OH 43624-1627
(419) 255-7552